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No. 00-1505

IN THE

Supreme Court of the United States

MONOGRAM CREDIT CARD BANK OF GEORGIA,
Petitioner,

v.

PATRICIA HEATON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent nowhere disputes that there is a square and acknowledged conflict among the circuits regarding whether a district court's invocation of 28 U.S.C. § 1447(c) in a remand order operates as "magic words" that conclusively insulate that order from review. Instead, she urges the Court not to resolve the conflict in this case, asserting incorrectly that the ruling of the Fifth Circuit does not implicate the conflict or has become moot.

These arguments are entirely meritless. The Fifth Circuit expressly invoked the "magic words" doctrine in refusing to consider the impact on reviewability of the district court's dismissal of respondent's federal Truth-in-Lending Act ("TILA") claim, thus applying the precise rule that has been rejected in every other circuit that has considered the issue. Moreover, the case plainly is not moot. Monogram continues to be denied its congressionally mandated right to defend this case in federal court, and a favorable decision from this Court would allow that right to be vindicated. Accordingly, this Court should grant Monogram's petition for a writ of certiorari.

1. Respondent's principal argument is that the Fifth Circuit did not apply the magic words doctrine, and that the petition thus "does not present the question raised by Petitioner." Br. in Opp. 14. This is merely wishful thinking. The Fifth Circuit's opinion could not have been clearer:

> Monogram urges us to conduct an independent review of the remand order to determine the "true" basis for the remand. However, we note that in *Bogle* [*v. Phillips Petroleum Co.*, 24 F.3d 758, 762 (5th Cir. 1994)], looking at the face of the remand order we stated: "The

> magic words 'this case does not contain a federal claim' rendered the district court's remand order unreviewable."

Pet. App. 8a.

Respondent's argument to the contrary is premised on the observation that the Fifth Circuit "painstakingly reviewed the language of the remand order" and concluded that the district court "'clearly intended to base his order on § 1447(c).'" Br. in Opp. 15. That is precisely our point. The court of appeals acknowledged that the district court had subject matter jurisdiction and plainly erred in its invocation of § 1447(c). Yet the Fifth Circuit refused to review the remand order simply because the order cited, albeit erroneously, § 1447(c).

Indeed, Monogram does not dispute that the district court intended to invoke, and actually did invoke, § 1447(c). The critical point is that the court did so only after asserting subject matter jurisdiction over the case and dismissing respondent's TILA claim with prejudice. Respondent does not contest that when a district court dismisses a federal claim with prejudice and then remands any remaining state claims, that order is reviewable. The issue before the Fifth Circuit, and the issue before this Court now, is whether a different result is required when the district court does so, but then utters the magic words "lack of subject matter jurisdiction." The Fifth Circuit held, citing *Bogle*, that the invocation of those magic words did indeed preclude appellate review. In so doing, it created a conflict with every other circuit – seven in all – to have addressed the issue.

As pointed out in Monogram's petition, the Fifth Circuit's explicit refusal to examine the "'true' basis" of the remand order – rather than that expressed by the district court – is flatly contrary to numerous cases holding that the label the district court puts on its order is not conclusive of reviewability, and that appellate courts have an independent obligation to consider the district court's action "not by the name the court gave (its decision) but by what in legal effect it actually was." *United States v. Sisson*, 399 U.S. 267, 279 n.7 (1970), *cited in* Monogram Pet. 21; *see generally* Monogram Pet. 21-23.

Respondent suggests weakly that a few of the cases relied on by Monogram are distinguishable because the orders either did not contain reasons or were "facially ambiguous" as to why the remand was granted. *See* Br. in Opp. 17.[1] But that argument misses the point. The district court's order in this case was internally contradictory, precisely because the court dismissed the federal TILA claim with prejudice – an action that required jurisdiction – while purporting to remand the action to state court for lack of jurisdiction. The fact that there was no ambiguity in the court's invocation of § 1447(c) – the point that respondent emphasizes – is entirely irrelevant.

In any event, there is no doubt that the magic words approach applied by the Fifth Circuit conflicts with the analysis in cases like *Mangold v. Analytic Serv., Inc.*, 77 F.3d

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[1] Oddly, two of the five cases purportedly "distinguished" by respondent do not even appear in Monogram's petition. *See* Br. in Opp. 17 (citing *Transit Casualty Co v Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 624 (8th Cir. 1997), and *Zuniga v Blue Cross & Blue Shield of Michigan*, 52 F 3d 1395 (6th Cir. 1995)).

1442 (4th Cir. 1996). As noted in the petition, *see* Monogram Pet. 14 n.8, the dissent in *Mangold* explicitly invoked the Fifth Circuit's magic words doctrine, and the majority explicitly held that a court of appeals has the "power – and responsibility" to look past even specific citations to § 1447(c) to determine the "actual basis being invoked as authority for remand." *Id.* at 1452; *see also Flores v. Long*, 110 F.3d 730, 732 (10th Cir. 1997) ("Mere mention of § 1447(c) or the 'magic words' of subject matter jurisdiction, however, do not automatically render a remand order nonreviewable under § 1447(d)."); *Carvel v. Thomas and Agnes Carvel Foundation*, 188 F.3d 83, 85-86 (2d Cir. 1999) (reviewing remand order after concluding, notwithstanding the district court's characterization of its own order, that the order was based on abstention, not lack of subject matter jurisdiction). *See generally* Monogram Pet. 14-17 (citing other cases).

In short, the Fifth Circuit examined the remand order to determine whether the district court *thought* it had subject-matter jurisdiction and then relied solely on magic words in refusing to determine what the district court actually *did*. *Cf. Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 357 (1976) (Rehnquist, J., dissenting) (noting that the necessary consequence of *Thermtron* is that the Court would have jurisdiction to review a remand order in which the district court "state[s] that it finds no jurisdiction, using the rubric of § 1447(c), but the papers plainly demonstrate such a conclusion to be absurd"). The conflict in the circuits is thus squarely presented.

2. Respondent also argues that the "petition should be denied as moot." Br. in Opp. 18. The principal basis for this contention is the FDIC's ongoing effort – thus far

unsuccessful – to intervene in state or federal court.[2] The FDIC contends (and Monogram agrees) that the FDIC's intervention would allow the federal district court to exercise subject matter jurisdiction over the case. *See* 12 U.S.C. § 1819(b)(2)(A).

Nothing in the FDIC's intervention efforts renders this petition moot, because the case has *not* been moved to federal court. If this Court were to reverse the Fifth Circuit's reviewability decision, the merits of the remand order would then be before the Fifth Circuit, and the Fifth Circuit could (and likely would) reverse that order. The case would then proceed in federal court instead of state court. Right now, however, the FDIC's efforts have been unsuccessful, and this case remains in state court. Thus, Monogram's pursuit of its right to a federal forum most plainly is not moot.

To be sure, the case would become moot if a state or federal court were to grant the FDIC the right to intervene and the case were removed to federal court. But respondent's reliance on that possibility is particularly ironic given that respondent has vigorously opposed the FDIC's efforts to intervene to defend against respondent's attack on its regulatory scheme. In any event, this is merely speculation about future events. No court has allowed the FDIC to intervene, and the possibility that one someday might provides no basis for denial of certiorari now. This case

[2] That effort is currently focused on a pending appeal to the Fifth Circuit by the FDIC and a pending motion filed by the FDIC in state court.

presents a mature decisional conflict on an important issue of federal law and should be reviewed now.[3]

3. Respondent's remaining arguments merit little comment. Respondent suggests, for example, that Monogram has somehow "waived" its right to seek review of the Fifth Circuit's decision by attempting to remove the case to federal court a second time. That is nonsense. Monogram has consistently maintained that the Fifth Circuit's refusal to review the district court's remand order was erroneous. For that reason, even as it filed its second notice of removal, Monogram filed a timely petition for rehearing and then a timely petition for certiorari. In the interim, however, this case was not stayed, and thus Monogram pursued an entirely legitimate course of action aimed at protecting its interests in the event its efforts to seek further review of the Fifth Circuit's ruling were unsuccessful.[4]

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[3] Respondent spends a significant portion of the Brief in Opposition setting forth her view that the FDIC has somehow acted improperly in supporting Monogram in this case. Although Monogram strongly disagrees with respondent's characterization of the FDIC's actions, respondent's attack is entirely irrelevant to the reviewability issue currently before this Court, and we thus will not now burden the Court with a detailed response. Suffice it to say, the principal FDIC action on which Monogram relies to establish its status as a state bank was taken in *1988*, many years before any of the events relating to this litigation and ten years before respondent filed her initial complaint.

[4] There is no small measure of irony in respondent's reliance on the second removal to claim that Monogram has waived review of the Fifth Circuit's decision. The Fifth Circuit's decision explicitly invited Monogram to remove its case to federal court on the basis of the TILA claim. Pet. App 12a & n 6. Monogram merely accepted that invitation, only to learn that respondent, by obtaining from the state court an *ex parte* dismissal of the TILA claim on the day the Fifth Circuit's decision was announced, had subverted the clear intent of that Circuit

Respondent also suggests that if Monogram prevails, "the appellate floodgates will open and consistency will be lost." Br. in Opp. 19. But there is no evidence that the rule applied in every other circuit has opened the "floodgates" for appeals of remand orders or created some undescribed problem of "inconsistency." That rule only serves to assure that appealability turns on the reality of what the district court did, rather than the "magic words" it may erroneously have used. Only review by this Court of the Fifth Circuit's contrary rule can assure consistency in appellate review of remand orders. Accordingly, the Court should agree to review this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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